Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-486

JAMES GROH,
Petitioner,

v.

STATE OF WISCONSIN,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF WISCONSIN

BRIEF IN OPPOSITION

BRONSON C. LA FOLLETTE
Attorney General

BETTY R. BROWN
Assistant Attorney General

DAVID J. BECKER
Assistant Attorney General

Attorneys for Respondent.

Post Office Address:

114 East, State Capitol
Madison, Wisconsin 53702

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JURISDICTION

This Court has no jurisdiction under 28 U.S.C. §1257 (3) to review the question presented since such question raises an issue of state law, not of constitutional dimension.

QUESTIONS PRESENTED

The petitioner posits the following question:

Whether a trial court's refusal to order the prosecution to disclose written statements concerning the subject matter of

critical prosecution witnesses' testimony for use by defense counsel in cross-examination of these witnesses constitutes harmless error.

The respondent submits that the answer to the following question is dispositive of the issue of whether or not the petition for a writ of certiorari should be granted:

Does the failure in a state court criminal proceeding to disclose prior written statements concerning the subject matter of prosecution witnesses' testimony for use by defense counsel on cross-examination present a federal question?

ARGUMENT

This Court Has No Jurisdiction Under 28 U.S.C. §1257 (3) To Review The Question Presented By The Petitioner Since Such Question Raises No Issue Of Constitutional Dimension.

The petitioner complains about the refusal of the trial court to order production of the memo books and reports of certain police officers who testified for the state. The respondent submits that this Court is without jurisdiction to consider such complaint since it fails to raise an issue of constitutional dimension.

The right under Wisconsin state law to prior written statements of prosecution witnesses was established in *State v. Richards*, 21 Wis. 2d 622, 124 N.W. 2d 684 (1963), and later codified in sec. 971.24, Wis. Stats. As the petitioner correctly points out, "It is clear from a reading of *Richards* that it is the functional equivalent of 18 U.S.C. §3500" (Petition for a Writ of Certiorari, p. 5). 18 U.S.C. § 3500 — the so-called "Jencks Act" — is the codification, in modified form, of the rule announced by this Court in *Jencks v. United States*, 353 U.S. 657, 77 S.Ct. 1007, 1

L.Ed. 2d 1103 (1957). *Palermo v. United States*, 360 U.S. 343, 79 S.Ct. 1217, 3 L.Ed. 2d 1287 (1959).

In adopting the *Jencks* rule in the *Richards* case, the Supreme Court of Wisconsin expressed doubt "as to whether *Jencks v. United States* would be binding on the states under due process." *State v. Richards, supra*, 21 Wis. 2d at 632, 124 N.W. 2d at 689. There was good cause for such doubt. This Court in its later decision in *United States v. Augenblick*, 393 U.S. 348, 89 S.Ct. 528, 21 L.Ed. 2d 537 (1969), clearly and unequivocally held that the *Jencks* decision and the Jencks Act did not rise to a constitutional level:

> ". . . our *Jencks* decision and the Jencks Act were not cast in constitutional terms. Palermo v. United States, supra, at 345, 362, 79 S.Ct., at 1229. They state rules of evidence governing trials before federal tribunals; and we have never extended their principles to state criminal trials. It may be that in some situations, denial of production of a Jencks Act type of a statement might be a denial of a Sixth Amendment right. There is, for example, the command of the Sixth Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. Palermo v. United States, supra, at 362, 79 S.Ct., at 1229, 3 L.Ed. 2d 1287 (Brennan, J., concurring in result). But certain it is that this case is not a worthy candidate for consideration at the constitutional level.
>
> "The Court of Claims, in a conscientious effort to undo an injustice, elevated to a constitutional level what it deemed to be an infraction of the Jencks Act and made a denial of discovery which 'seriously impeded his right to a fair trial' a violation 'of the Due Process Clause of the Constitution.' 377 F. 2d, at 606-607, 180 Ct.Cl., at 166. But apart from trials conducted in violation of express constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or forgotten, as in Moore v. Dempsey, supra, that the proceeding is more a spectacle (Rideau v. Louisiana, 373 U.S. 723, 726, 83 S.Ct. 1417, 1419, 10 L.Ed. 2d 663) or trial by

ordeal (Brown v. Mississippi, 297 U.S. 278, 285, 56 S.Ct. 461, 464, 80 L.Ed. 682) than a disciplined contest." 393 U.S. at 356, 89 S.Ct. at 533-534, 21 L.Ed. 2d at 545.[1/]

Clearly the failure in the present case to comply with the Wisconsin equivalent of the *Jencks* rule was not an error of constitutional dimension. The inability of the petitioner to cross-examine the witnesses in question on the basis of their prior written statements, which at most would have shown that in preparing those statements the witnesses had omitted to note certain immaterial details, certainly did not reduce the proceeding to a mere "spectacle" or a "trial by ordeal." Any contention to the contrary would be patently frivolous and without arguable merit. Consequently, the conclusion reached by this Court in *Augenblick* is equally applicable here:

> ". . . certain it is that this case is not a worthy candidate for consideration at the constitutional level." 393 U.S. at 356, 89 S.Ct. at 533, 21 L.Ed. 2d at 545.

[1/]State appellate courts, both before and after this Court's decision in *United States v. Augenblick, supra,* appear to have uniformly held that the principles announced in the *Jencks* case and later codified in 18 U.S.C. §3500 were not cast in constitutional terms and consequently are not binding on the states. See, e.g., *State v. King,* 296 Minn. 306, 208 N.W. 2d 287 (1973); *State v. Gladden,* 260 La. 735, 257 So. 2d 388 (1972); *State v. Kahinu,* 53 Ha. 536, 498 P. 2d 635 (1972); *People v. Bellanca,* 20 Mich. App. 1, 173 N.W. 2d 754 (1970), remanded on other grounds, 386 Mich. 708, 194 N.W. 2d 863 (1972); *Mahone v. State,* 120 Ga. App. 234, 170 S.E. 2d 48 (1969); *State v. Mascarenas,* 80 N.M. 74, 451 P. 2d 567 (1968), rev. on other grounds, 80 N.M. 537, 458 P. 2d 789 (1969); *State v. Page,* 104 R.I. 323, 244 A. 2d 258 (1968); *State v. Smith,* 431 S.W. 2d 74 (Mo. 1968); *Sanders v. State,* 278 Ala. 453, 179 So. 2d 35 (1965); *State v. Shouse,* 177 So. 2d 724 (Fla. App. 1965); *McKenzie v. State,* 236 Md. 597, 204 A. 2d 678 (1964); *State v. Hill,* 193 Kan. 512, 394 P. 2d 106 (1964); *Erving v. State,* 174 Neb. 90, 116 N.W. 2d 7 (1962); *State v. Robinson,* 61 Wash. 2d 107, 377 P. 2d 248 (1962); *People v. Wolff,* 19 Ill. 2d 318, 167 N.E. 2d 197 (1960); *State v. La Vallee,* 122 Vt. 75, 163 A. 2d 856 (1960); *Anderson v. State,* 239 Ind. 372, 156 N.E. 2d 384 (1959); *State v. Kelly,* 249 Iowa 1219, 91 N.W. 2d 562 (1958).

CONCLUSION

For the reason indicated, the respondent respectfully requests this Court to deny the petition for writ of certiorari filed herein.

Respectfully submitted,

BRONSON C. LA FOLLETTE
Attorney General

BETTY R. BROWN
Assistant Attorney General

DAVID J. BECKER
Assistant Attorney General

Attorneys for Respondent.

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Madison, Wisconsin 53702